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No. 07-9995

IN THE

Supreme Court of the United States

MICHAEL RIVERA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ of Certiorari to the Supreme Court for the State of Illinois

BRIEF OF THE PETITIONER

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QUESTION PRESENTED

Whether the erroneous denial of a criminal defendant's peremptory challenge that resulted in the challenged juror being seated requires automatic reversal of a conviction because it undermines the trial structure for preserving the constitutional right to due process and an impartial jury.

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OPINIONS BELOW

The decision of the Illinois Supreme Court under review is reported at *People* v. *Rivera*, 879 N.E.2d 876 (Ill. 2007) and reproduced in the Joint Appendix at JA 144-76. The previous decision of the Illinois Supreme Court is reported at 852 N.E.2d 771 (Ill. 2006) and reproduced at JA 94-133. The opinion of the Illinois Appellate Court is reported at 810 N.E.2d 129 (Ill. App. Ct. 2004) and reproduced at 63-93. The judgment of the Circuit Court of Cook County is unreported. It is reproduced at JA 61-62.

JURISDICTION

The opinion and judgment of the Illinois Supreme Court was entered on November 29, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial[ ] by an impartial jury[.]

U.S. Const. amend. VI.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A Cook County jury found petitioner guilty of first-degree murder in the shooting death of Marcus Lee. The foreperson, Delores Gomez, should never have been seated on the jury. Petitioner's trial counsel attempted to use one of his peremptory challenges during voir dire to excuse Ms. Gomez. But the trial court erroneously refused to dismiss her. Petitioner was thus found guilty by a tribunal that included an illegitimate juror. The Illinois Supreme Court nonetheless refused to order a new trial because it concluded that the error was harmless.

The Illinois Supreme Court erred. A trial before a defectively constituted tribunal is the very essence of structural error: it "affect[s] the framework within which the trial proceeds." *Arizona* v. *Fulminante*, 499 U.S. 279, 309-10 (1991). This Court has consistently so held, ordering reversal automatically whether the defect concerns the judge, judicial panel, or jury.

Further, the nature of this error makes review for harmlessness impossible. Appellate review for harmlessness is no replacement for the first-hand evaluation of the testimony and evidence by a panel of lawful jurors. The kind of plenary consideration of the whole record that might be attempted (and was performed by the Illinois Supreme Court here) would violate the Sixth Amendment right to a jury trial.

Finally, the erroneous denial of defense counsel's exercise of a peremptory challenge produced not only an unlawful adjudicator, but also created an unacceptable risk of bias in the resolution of the proceedings. Our legal tradition has long acknowledged that the criminal defendant's right to have defense counsel exercise his or her judgment regarding prospective jurors is part of the process of

insuring trial before a fair tribunal. By denying petitioner the lawful effect of his trial counsel's judgment, the State fundamentally altered the structure of the trial in violation of the Due Process Clause of the Fourteenth Amendment. For this further reason, automatic reversal is required.

1. Marcus Lee was shot to death on the evening of January 10, 1998. JA 64. The government alleged that petitioner was a gang enforcer, and that petitioner shot Lee in the mistaken belief that Lee was a member of a rival gang. JA 64.

Jury selection took place on August 7, 2000. When Delores Gomez was seated in the jury venire, she was initially questioned by the court. JA 28-32. In response to the court's questions, Ms. Gomez indicated that she had been working at Cook County Hospital for 22 years. JA 29. Petitioner's trial counsel further questioned Ms. Gomez. Ms. Gomez indicated that she works as a "business office supervisor" in an out-patient orthopedic clinic of the hospital. JA 32. Counsel discussed with Ms. Gomez the fact that Cook County Hospital treats numerous patients for gunshot wounds, and inquired into whether she has contact with patients at the hospital. JA 32. Ms. Gomez indicated that she has direct contact with patients in her clinic. JA 32. Ms. Gomez further indicated that her experiences at the hospital would not prevent her from judging fairly the evidence regarding an alleged shooting. JA 32-33.

At the completion of the questioning, counsel for petitioner, in open court and in front of the assembled venire, asked to have Ms. Gomez excused from service. JA 33. Counsel for respondent did not assert that the challenge was objectionable. The court, however, did not excuse Ms. Gomez. Instead the court *sua sponte* called all counsel, and petitioner, into

chambers. JA 33-34. Ms. Gomez remained in the jury box at this time. JA 33.

In chambers, the trial court asked petitioner's counsel to articulate the reason why he was choosing to strike Ms. Gomez from the jury. JA 34. Trial counsel indicated that he was concerned that Ms. Gomez works at a hospital that treats an extraordinarily high number of gunshot victims, and that she might routinely see such victims come through the orthopedic clinic at the hospital. JA 34. Trial counsel further explained that he was "pulled in two different" directions with regard to this juror, because she has an Hispanic surname (like petitioner). JA 34.

After the court interrupted petitioner's counsel to state its impression that Ms. Gomez "appears to be an African American female," it asked to hear from the State. JA 34. Without addressing petitioner's counsel's concern about Ms. Gomez's exposure to gunshot victims, counsel for the State expressed his view that "the offered cause for Ms. Gomez is [not] a sufficient reason to excuse her as a juror." JA 34-35. Shortly thereafter, the State expressly asked to have Ms. Gomez "impaneled as a juror." JA 35.

The court then ruled that Ms. Gomez should be seated. JA 35-41. The court noted that (assuming Ms. Gomez is an African-American female) this was the second African-American female trial counsel had excused pursuant to a peremptory challenge, ignoring trial counsel's observation that another African-American female had already been impaneled. JA 35. The trial court concluded that the peremptory challenge as to Ms. Gomez was discriminatory. JA 36. Petitioner's counsel objected to the trial court's ruling. JA 36.

Petitioner's trial counsel asked and was granted the opportunity to question Ms. Gomez further. JA 36. Ms. Gomez was brought into chambers. Ms. Gomez clarified that her clinic is a building that is separate from, but close to, the main hospital building. JA 37-38. Ms. Gomez confirmed counsel's surmise that some of the patients she sees are victims of gun violence. JA 38.

After Ms. Gomez was excused and returned to the courtroom, petitioner's trial counsel informed the court that he had been to the clinic where Ms. Gomez works, and that "[i]t's wall to wall victims and patients coming in there, and I could see it's a disturbing place for me to be there when I've been there." JA 40. Counsel for petitioner thereafter repeated his request to strike Ms. Gomez. The trial court chose not to change its prior ruling and "overr[o]de [petitioner's] peremptory challenge as to Ms. Gomez." JA 39-40.

Ms. Gomez was seated as a juror with full knowledge that petitioner's counsel had sought to have her excluded from service. She was selected as the foreperson of the jury. JA 43-44. At the conclusion of the trial, the jury found petitioner guilty, and the trial court sentenced him to 85 years in prison. JA 61-62.

2. The Illinois Appellate Court affirmed petitioner's conviction and sentence, rejecting his contention that the trial judge erred in denying his peremptory challenge to Ms. Gomez. JA 63-79. As relevant, the appellate court ruled that the trial court had not "manifestly" erred in concluding that petitioner's trial counsel had "engaged in purposeful discrimination" in attempting to excuse Ms. Gomez from the jury. JA 79. It thus upheld the trial court's rejection of petitioner's peremptory challenge under the authority

of *Batson* v. *Kentucky*, 476 U.S. 79 (1986), and *Georgia* v. *McCollum*, 505 U.S. 42 (1992).

The Illinois Supreme Court did not affirm in its initial review. Instead, it remanded the case to the trial court to give the trial judge the opportunity to more fully "articulate the bases for his *Batson* rulings." JA 132. Based on the record before it at that time, the Illinois Supreme Court could not discern from the trial court's decision whether there was a sufficient prima facie case of discrimination, or even what the alleged basis of discrimination was (race or gender or something else) to warrant rejecting counsel for petitioner's peremptory challenge to Ms. Gomez. JA 130-32. That is, the Illinois Supreme Court recognized that petitioner's trial counsel should not have been asked to articulate a reason for his peremptory challenge to Ms. Gomez unless the record, when he initially sought to strike her, established a prima facie case of discrimination. JA 122-23.

On remand, the trial judge attempted to articulate some prima facie case of discrimination as of the time petitioner's trial counsel first sought to exclude Ms. Gomez from the jury. Six years after the events at issue, the trial court stated that he had believed that petitioner's trial counsel "was seeking to excuse Mrs. Gomez because she in fact was a woman." JA 136.

After considering the supplemented record, the Illinois Supreme Court concluded that petitioner's peremptory challenge to Ms. Gomez should have been honored. The "record [on remand] fail[ed] to support a *prima facie* case of discrimination *of any kind*." JA 157. Petitioner's trial counsel should never have been required to explain his rationale for excluding Ms. Gomez. Further, the Illinois Supreme Court concluded that "the fact that she had frequent contact

with gunshot victims seems to us a valid reason why defense counsel might want to excuse her." JA 157. Ms. Gomez should not have sat on the jury.

3. The Illinois Supreme Court nonetheless affirmed petitioner's conviction. It held that the error here does not require automatic reversal, and was harmless.

The Illinois Supreme Court believed that decisions of this Court, and its own decisions relying on this Court's rulings, resolve the question whether harmless-error analysis or automatic reversal applies. JA 158. Though acknowledging the central role of peremptory challenges in ensuring the fairness of jury trials throughout the nation's history, JA 158-59, the Illinois Supreme Court concluded that this Court made clear in *United States* v. *Martinez-Salazar*, 528 U.S. 304 (2000), that it "no longer considers peremptory challenges indispensable to a fair trial or their erroneous denial a matter necessarily requiring reversal." JA 159; JA 163 (concluding that *Martinez-Salazar* left nothing to implication and that the adoption of the harmless-error rule was "explicit").

In *Swain* v. *Alabama*, this Court had stated that the "denial or impairment of the right [to exercise a peremptory challenge] is reversible error without a showing of prejudice." 380 U.S. 202, 219 (1965), *overruled in part on other grounds by Batson* v. *Kentucky*, 476 U.S. 79 (1986). In *Martinez-Salazar*, this Court characterized *Swain*'s statement as "unnecessary to the decision in that case" and "founded on a series of our early cases decided long before the adoption of harmless-error review." 528 U.S. at 317 n.4. The Illinois Supreme Court read that footnote as "signaling that [*Swain*'s] legal proposition

is no longer good law in the age of 'harmless-error review.'" JA 162.

In addition to following what it perceived to be the mandate of *Martinez-Salazar*, the Illinois Supreme Court concluded that the error at issue here is not "structural" under this Court's decisions because "the erroneous denial of a peremptory challenge has not been included" on any list of structural errors this Court has recited. JA 163. Because Ms. Gomez had not been challenged for cause, the Illinois Supreme Court concluded that this case was different from one involving trial before a biased judge or jury, which it acknowledged would require automatic reversal. JA 163-64.

The Illinois Supreme Court also rejected the assertion that harmless-error analysis should not apply because the error is not the sort that can be assessed for harm. Relying on this Court's decision in *Neder* v. *United States*, 527 U.S. 1 (1999), and its subsequent decisions relying on *Neder* (*People* v. *Thurow*, 786 N.E.2d 1019 (Ill. 2003), and *People* v. *Nitz*, 848 N.E.2d 982 (Ill. 2006)), the Illinois Supreme Court believed it was permitted to "qualitatively assess for harm Gomez's presence on the jury[ ] by applying the rational juror standard to the evidence adduced against defendant. If the evidence is so overwhelming that no rational jury—or juror—would have acquitted the defendant of the offense, then Gomez's presence on the jury cannot be said to have prejudiced [petitioner]." JA 166.

The Illinois Supreme Court then applied that standard to the record. Based on its review of the paper record, the Illinois Supreme Court concluded that "[a]ny inconsistencies in the witnesses' grand jury testimony were insignificant when compared" to what it deemed "compelling" testimony. JA 166-71. It

declared that the evidence of guilt was "overwhelming." JA 171. Ms. Gomez's unlawful participation in the proceedings as foreperson of the jury was thus deemed harmless.

SUMMARY OF ARGUMENT

Petitioner was tried before a jury that included an individual who was empanelled contrary to law. The conviction rendered by that jury must be automatically reversed for three distinct reasons.

First, the error is quintessentially structural. Ms. Gomez's authority to participate as a juror was voided by petitioner's lawful exercise of a peremptory challenge. This Court has consistently ordered reversal of judgments in cases involving improperly constituted tribunals. Whether the error goes to the propriety of the judge presiding over a trial, or the construction of a judicial panel or a jury, automatic reversal has been the unwavering rule. It has not mattered if the error raised concerns regarding any potential bias in the tribunal. The lack of lawful authority to render judgment has been sufficient to require reversal. For this reason alone, this Court should reverse petitioner's conviction.

Second, a court cannot review the record for harmlessness when the trial included an unlawful adjudicator. There is no way to know how the jury's deliberations would have been different if Ms. Gomez had been excluded. Jury deliberations are secret. And even if they were not, it still would be impossible to know who the replacement juror would have been, much less how that juror might have affected the deliberations. Appellate review for harmlessness is no replacement for the consideration of a panel composed of lawful jurors. As the Illinois Supreme Court's opinion makes clear, a court reviewing for

harmlessness would be required to engage in wholesale review of the record and render its own independent judgment regarding the prospects of acquittal before a hypothetical reasonable (and properly constituted) tribunal. This is the equivalent of an impermissible directed verdict of guilt on every element of the offense in violation of the Sixth Amendment right to trial by jury. For this reason as well, automatic reversal is required.

Third, automatic reversal is warranted because the error created a sufficient risk of jury bias. Ms. Gomez sat on petitioner's jury because the trial court refused his lawful peremptory challenge to her. For centuries, the peremptory challenge has been understood as aimed at ensuring a fair and impartial jury. It empowers counsel for the parties to reject those who they believe would be unfair, so long as the exclusion is not based on invidiously discriminatory criteria. In asserting a peremptory strike, the defendant expresses doubt about the fairness of the juror who is the object of the challenge. By granting the defendant the right to use peremptory challenges, the State encouraged petitioner to express his concerns about Ms. Gomez under the expectation that his concerns would be respected and Ms. Gomez would be dismissed. Instead, the State, with full knowledge of petitioner's concerns, empanelled her. This process created an unacceptable risk of bias in the tribunal that both violates due process and requires automatic reversal.

ARGUMENT

This Court has recognized a distinction between "trial errors" and "structural defects." *Fulminante*, 499 U.S. at 307-08. Trial errors are subject to harmless-error review; structural defects are not, and

require automatic reversal. *United States* v. *Dominguez-Benitez*, 542 U.S. 74, 81 (2004).

Trial errors "'occur[ ] during presentation of the case to the jury' and their effect may 'be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt.'" *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (quoting *Fulminante*, 499 U.S. at 307-08) (second alteration in original). By contrast, structural defects "'affec[t] the framework within which the trial proceeds,' and are not 'simply an error in the trial process itself.'" *Id.* (alteration in original).

Here a juror participated in rendering a verdict of guilt despite the fact that petitioner lawfully voided her as a juror through his peremptory challenge. This was a structural defect at the center of the "'framework within which the trial proceeds.'" *Id.* (quoting *Fulminante*, 499 U.S. at 309-10). It cannot be trial error because the error cannot "'be quantitatively assessed in the context of other evidence presented in order to determine'" harmlessness. *Id.*

I. TRIAL BEFORE AN UNLAWFUL ADJUDICATOR IS STRUCTURAL ERROR.

Petitioner had the right to a trial in which Ms. Gomez did not sit on his jury. Illinois law provides seven peremptory challenges to defendants charged with a non-capital felony. Ill. Sup. Ct. R. 434(d). Petitioner's counsel, based on his personal experience and questioning of Ms. Gomez, determined not to bear the risk that Ms. Gomez's past exposure to victims of gun violence would bias her against petitioner, who had been charged with shooting Mr. Lee. JA 33-34.

Even inquiring into the reason why trial counsel chose to strike Ms. Gomez is an intrusion on the right to a peremptory challenge. The right includes the right *not* to have to explain one's reasons for excluding a juror, *Swain*, 380 U.S. at 220 ("[t]he essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control"), at least in the absence of a prima facie case that the peremptory strike is based on any constitutionally impermissible criteria, see *McCollum*, 505 U.S. at 59 (racial discrimination in use of peremptory challenge impermissible); *J.E.B.* v. *Alabama,* 511 U.S. 127, 146 (1994) (gender discrimination in use of peremptory challenge impermissible). The Illinois Supreme Court held that there was no prima facie case of discrimination. JA 157.

Here, the intrusion on petitioner's right was complete. The trial court seated Ms. Gomez on the jury without any lawful basis to override petitioner's peremptory strike. Petitioner's lawful challenge to Ms. Gomez voided her as a juror; the jury that sat in judgment of petitioner was thus defectively constituted.

Ms. Gomez's participation as an unlawful adjudicator requires automatic reversal of petitioner's conviction. Denial of the right to have one's criminal trial adjudicated by those with lawful authority to do so can never be treated as harmless. *Gomez* v. *United States*, 490 U.S. 858, 876 (1989). When the factfinder in a proceeding acted without lawful authority, the only appropriate response of an appellate court is to remand the case so that the proceeding may be conducted before a legitimate tribunal. *Wingo* v. *Wedding*, 418 U.S. 461, 473-74 (1974), *overruled by*

statute in part as recognized in Gomez, 490 U.S. at 868 n.14.

A. This Court Has Consistently Reversed Judgments Without Conducting Harmless-Error Review When There Was Error In The Composition Of The Tribunal.

This Court has never conducted harmless-error review of a judgment rendered by an improperly constituted tribunal. Errors affecting the composition of the jury have consistently led this Court to reverse without review for harmlessness. Errors going to the propriety of the presiding judge or judicial panel and even the prosecutor have consistently led this Court to reverse without review for harmlessness. This rule predates the modern approach to harmless-error review ushered in by *Chapman* v. *California*, 386 U.S. 18 (1967), and it is has continued since. The rule applies beyond cases involving a concern that the tribunal is biased. And the rule applies even in the absence of a violation of any constitutional right.

Errors affecting the composition of the jury have consistently been held to require automatic reversal. *Gray* v. *Mississippi*, 481 U.S. 648, 660-68 (1987) (improper exclusion of juror with scruples regarding the death penalty from capital case); *Batson*, 476 U.S. at 100 (unlawful exclusion of jurors based on race); *Vasquez* v. *Hillery*, 474 U.S. 254, 263-64 (1986) (unlawful exclusion of grand jurors based on race); *Peters* v. *Kiff*, 407 U.S. 493, 505 (1972) (systematic exclusion from grand jury on basis of race requires automatic reversal regardless of race of defendant); *Irvin* v. *Dowd*, 366 U.S. 717, 728 (1961) (pretrial publicity calling into question jury's impartiality); *Thiel* v. *S. Pac. Co.*, 328 U.S. 217, 224-25 (1946) (exclusion from jury venire of hourly wage earners).

The same rule applies to errors regarding the propriety of a presiding judge. *Gomez*, 490 U.S. at 876 (judge without statutory authority to preside over voir dire); *Wingo*, 418 U.S. at 473-74 (magistrate without authority to preside over habeas corpus hearing); *In re Murchison*, 349 U.S. 133, 139 (1955) (same judge presiding over criminal contempt proceeding who presided over underlying proceeding); *Tumey* v. *Ohio*, 273 U.S. 510, 535 (1927) (judge with financial interest in outcome). Automatic reversal is required when a judicial panel was defectively constituted. *Nguyen* v. *United States*, 539 U.S. 69, 81-83 (2003) (vacating and remanding appellate ruling because one member of appellate panel was not life-tenured, Article III judge); *United States* v. *Am.-Foreign S.S. Corp.,* 363 U.S. 685, 691 (1960) (vacating decision of en banc panel because a retired judge impermissibly participated and expressly declining to consider the underlying merits of the case); *Ayrshire Colleries Corp.* v. *United States*, 331 U.S. 132, 144 (1947) (automatic reversal when only two judges participated on a panel and statute required three judges); *Moran* v. *Dillingham*, 174 U.S. 153, 158 (1899) (automatic reversal when, contrary to statute, appellate panel includes a judge who had presided in the cause of action in trial court).[1] And even though

[1] The only even arguable exception of which petitioner is aware concerns the so-called "de facto officer" doctrine, referred to in *Nguyen*, 539 U.S. at 77; *see McDowell* v. *United States*, 159 U.S. 596, 601-02 (1895). Not only does that doctrine apply only to "merely technical" defects, *Nguyen*, 539 U.S. at 77-80—and as discussed below, the defect here is not merely technical, *infra* at 19-20, 27-39 (violates due process), 25-26 (violates Sixth Amendment)—but the doctrine "is founded upon an obviously sound policy of preventing litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware." *Glidden Co.* v. *Zdanok*,

the prosecutor is an advocate and not an adjudicator, the public interest in justice a prosecutor is obliged to pursue, see *Berger* v. *United States*, 295 U.S. 78, 88 (1935), makes that role a part of the tribunal in a criminal proceeding. This Court has held that errors regarding the choice of an individual to prosecute a crime also require automatic reversal. *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 813-14 (1987) (plurality opinion) (reversing conviction when prosecutor had private interest in the proceeding); *id.* at 825 (Scalia, J., concurring).

As several of the cases illustrate, the automatic-reversal rule does not stem solely from a concern about any bias that may have affected the adjudication of the case. For example, in *Gomez*, this Court reversed a conviction when a magistrate was permitted to preside over voir dire without the consent of the defendant. The trial itself was not called into question. And the petitioner did not claim that any juror who was selected would have been different had a judge presided rather than a magistrate. Nonetheless, this Court reversed the conviction because the defendant was deprived of his "right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside." *Gomez*, 490 U.S. at 876.

In *Wingo*, this Court affirmed the reversal of a judgment in a habeas corpus proceeding because the hearing was presided over by a magistrate rather than a district judge. 418 U.S. at 473-74. There was no suggestion that the magistrate who presided over the hearing was biased. See *id.* at 466-67. The bare

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370 U.S. 530, 535 (1962) (opinion of Harlan, J.). Petitioner immediately objected to Ms. Gomez sitting on his jury, and has sought redress by appeal at every stage of this litigation. Ms. Gomez did not act with de facto authority.

fact that the wrong person was appraising the evidence live and in the first instance warranted a new hearing. *Id.* at 473-74.

In *Ayrshire Colleries*, this Court reversed a ruling rendered by two judges when the statute required a three-judge panel, even though the law permitted the concurrence of two judges to control over a dissenting third. 331 U.S. at 139. And in *Am-Foreign*, this Court reversed an en banc ruling of an appellate court based on the improper participation of a retired judge even though retired judges indisputably were permitted to sit on three-judge panels. 363 U.S. at 687-88. There was no suggestion that the retired judge was ill-suited to serve for any reason other than the fact that the plain meaning of the statute prohibited his participation. *Id.* at 690-91.

Similarly, *Young* reversed a criminal conviction even though there was no suggestion that the adjudicator was biased. *Young* involved a conviction for criminal contempt based on a violation of a court's injunction. The court-designated prosecutors were the same attorneys who had previously obtained the injunction in question on behalf of private parties. 481 U.S. at 790-92. Certain of the offenders pled guilty, but others went to trial and were convicted by a jury. *Id.* at 792. The convictions were reversed even though there was no suggestion of any error in the trial. What mattered was that the prosecutor had a private interest in the enforcement of the injunction. *Id.* at 812.

Cases involving defectively composed juries are equally strict. In *Vasquez* and *Peters*, this Court held fast to a long line of cases, see *Vasquez*, 474 U.S. at 261 (citing cases), that reversed judgments based on defects in the composition of the *grand* jury, even though there was no challenge to the composition of

the petit jury that delivered the actual verdict of guilt. See *id.* at 272 (Powell, J., dissenting) ("the grand jury error did not affect the fairness of respondent's trial . . . in any cognizable way"). Likewise, when racial discrimination in petit jury selection occurs, "[t]he composition of the trier of fact itself is called into question," *Powers* v. *Ohio*, 499 U.S. 400, 412-13 (1991), which "'casts doubt on the integrity of the judicial process,'" *id.* at 411 (quoting *Rose* v. *Mitchell*, 443 U.S. 545, 556 (1979)), separate and apart from any concern about bias in the tribunal.

Strict adherence to propriety in the construction of the foundational components of a trial cannot be compromised by harmless-error review. *Gomez*, 490 U.S. at 876; *Vasquez*, 474 U.S. at 264 (relying on the "overriding imperative to eliminate [a] systemic flaw in the charging process"); *Young*, 481 U.S. at 812. ("harmless-error analysis . . . would not be sensitive to the fundamental nature of the error committed"). And that the rule is as strict as applied to juries as it is to judges is hardly surprising. Our legal tradition has long treated judges and juries as equivalent in the respect that matters here: their power as adjudicators. *Jones* v. *United States*, 526 U.S. 227, 248 n.8 (1999) ("The principle that the jury were the judges of fact and the judges the deciders of law was stated as an established principle as early as 1628 by Coke.") (citing 1 Edward Coke, *Institutes of the Laws of England* 155b (1628)). Indeed, this Court has ordered a new hearing without regard to harmlessness when an unlawful judge (specifically, a magistrate) presided as the factfinder. *Wingo*, 418 U.S. at 473-74. The legal consequences of a proceeding adjudicated by an unlawful judge ought to be no different than the legal consequences of a

proceeding adjudicated by an unlawful juror. Both require automatic reversal.

Further, the rule requiring automatic reversal of a conviction involving an unlawful adjudicator applies even in the absence of a finding of a constitutional violation. In *Gomez*, this Court applied the automatic-reversal rule while also avoiding any constitutional inquiry by construing the federal statute governing referral of matters to magistrates to require a defendant's consent. 490 U.S. at 864-71. In *Wingo*, this Court reversed without regard to harmlessness even though the hearing was invalid not as a constitutional matter, but as a matter of the federal statutes (both the habeas corpus statute and the Magistrates Act) in effect at the time. 418 U.S. at 472-73.[2] Likewise, in *Young*, this Court applied an automatic reversal rule even though it avoided "reaching any constitutional issues" by relying on its supervisory authority to conclude that the appointment of the prosecutor in that case was error. 481 U.S. at 809 n.21.

In short, this case is readily resolved by this Court's unwavering rule: when the tribunal convened to render judgment includes an individual who by law should have been excluded, the judgment must be reversed without conducting harmless-error review. This Court need inquire no further.[3] Ms. Gomez had

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[2] Indeed, Congress later provided the authority for magistrates to preside over habeas corpus proceedings that had been lacking. *See Gomez*, 490 U.S. at 867 n.14. This Court has never questioned the constitutionality of the authority expressly granted by Congress after *Wingo*.

[3] This Court's jurisdiction does not depend on deciding whether petitioner's due process rights were violated, and so this Court may dispose of this case on the narrow ground suggested above. Under *Michigan* v. *Long*, 463 U.S. 1032, 1040-

no more authority to serve on petitioner's trial without his consent in this case than the magistrate in *Gomez* had to preside over voir dire without the defendant's consent in that case. And Ms. Gomez had no more authority to evaluate the evidence presented at petitioner's trial than the magistrate in *Wingo* had to evaluate the evidence presented at the habeas corpus hearing. Petitioner's conviction should no more be allowed to stand than the conviction at issue in *Gomez* or than the judgment at issue in *Wingo*.

B. Trial Before An Unlawful Adjudicator Violates Due Process.

For the reasons stated above, it is unnecessary to determine whether permitting Ms. Gomez to sit on the jury violated any constitutional right. Still, if this Court were to consider the question, it should conclude that seating Ms. Gomez after she had been voided as a juror by petitioner's lawful peremptory challenge violated his right to due process.

Nothing could be more basic to the fundamental administration of justice than that proceedings be adjudicated only by those with lawful authority. This

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41 (1983), this Court may review a state high court decision when, as here, that decision is not based on an independent and adequate state-law ground for its ruling. *See Kansas* v. *Marsh*, 548 U.S. 163, 169 (2006). The Illinois Supreme Court's ruling is expressly based on its interpretation of this Court's decisions in *Neder* and *Martinez-Salazar*. JA 160-66. The Illinois Supreme Court was applying its (mis)understanding of federal law regarding the applicability of automatic reversal and harmless-error analysis. In any event, as discussed below, petitioner's due process rights were violated when the trial court overrode his lawful peremptory challenge to Ms. Gomez and she participated in rendering a verdict of guilt. *See infra* at 19-20, 27-39. And the manner of harmless-error review the Illinois Supreme Court had to conduct violated petitioner's Sixth Amendment right to a jury trial. *See infra* at 25-26.

Court has expressly equated that basic right with the right to be tried before an impartial adjudicator. *Gomez*, 490 U.S. at 876. As discussed below, any trial before an adjudicator that is not impartial surely violates due process. *Infra* at 27-28. Therefore, a trial before a tribunal without lawful authority to adjudicate likewise violates due process.

Such a ruling would be consistent with this Court's longstanding treatment of unlawful adjudicators. An error that creates a panel of adjudicators without lawful authority to sit has been called "grave." *William Cramp & Sons Ship & Engine Bldg. Co.* v. *Int'l Curtiss Marine Turbine Co.*, 228 U.S. 645, 650 (1913). Indeed, such an error renders the judgment a ruling by a court which is "virtually no court at all, because not organized in conformity to law." *Id.* at 652; *Am. Constr. Co.* v. *Jacksonville Tampa & Key W. Ry.*, 148 U.S. 372, 387 (1893) (stating that an appellate court decree issued by a panel that included a judge who by statute was "incompetent to sit at the hearing" is "unlawful, and perhaps absolutely void"). Trial before a lawful adjudicator is the very foundation of the legitimacy of a judgment of guilt; trial before an unlawful adjudicator, therefore, denies so "basic" a right that it violates due process. See *Gomez*, 490 U.S. at 876. Moreover, trial before a jury with an unlawful member is fundamentally unfair in violation of due process.

II. THE WRONGFUL SEATING OF A JUROR IS STRUCTURAL ERROR BECAUSE HARMLESS-ERROR REVIEW IS IMPOSSIBLE TO CONDUCT.

Certain errors require automatic reversal because harmless-error analysis cannot be performed after they occur. The unlawful seating of a juror is such an error. For this independent reason, petitioner's

conviction should be reversed without conducting harmless-error review.

This Court has deemed certain errors structural because of "the difficulty in assessing the effect of the error." *Gonzalez-Lopez*, 548 U.S. at 149 n.4. Such difficulty often stems from the fact that the nature of the error renders its impact "necessarily unquantifiable and indeterminate." *Sullivan* v. *Louisiana*, 508 U.S. 275, 282 (1993); *Estes* v. *Texas*, 381 U.S. 532, 542-44 (1965) (error in televising trial subject to automatic reversal and listing cases where "one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced" as appropriate for automatic reversal).

For example, the denial of counsel of choice cannot be evaluated for harmlessness because the "myriad aspects of representation" (including, among other things, relationships with the prosecution, courtroom style, and, significantly, jury selection), which could conceivably and legitimately be handled differently by different counsel, would leave a reviewing court in the position of piling speculation on top of speculation about the impact. *Gonzalez-Lopez*, 548 U.S. at 150. Likewise, the joint representation of defendants with conflicting interests requires automatic reversal because the error often involves not what an advocate did on the record, but "what the advocate finds himself compelled to *refrain* from doing," such that "to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible." *Holloway* v. *Arkansas*, 435 U.S. 475, 490-91 (1978).

This Court has observed the same with respect to errors affecting the composition of the jury. In *Vasquez*, this Court concluded that there was no way to determine whether racial bias in the selection of a

grand jury "infect[ed] the framing of the indictment and, consequently, the nature or very existence of the proceedings to come." *Vasquez*, 474 U.S. at 263. In light of the "difficulty of assessing [the error's] effect on any given defendant," this Court adhered "to a rule of mandatory reversal." *Id.* at 264. *Vasquez* also observed that the "when a petit jury has been selected upon improper criteria . . . we have required reversal of the conviction because the effect of the violation cannot be ascertained." *Id.* at 263 (citing *Davis* v. *Georgia*, 429 U.S. 122 (1976) (per curiam)).

The effect of the error here—wrongfully seating Ms. Gomez on the jury—cannot be ascertained. When the error goes to the composition of the jury, "there is no way to determine what jury would have been selected under a [lawful] selection system, or how that jury would have decided the case." *Peters*, 407 U.S. at 504. Like the denial of counsel of choice or trial with counsel laboring under a conflict of interests, the impact of the error is invisible. Jury deliberations are secret; there is no record of them. *United States* v. *Olano*, 507 U.S. 725, 738 (1993); *United States* v. *Va. Erection Corp.*, 335 F.2d 868, 872 (4th Cir. 1964); see also Fed. R. Crim. P. 23(b), 1983 Advisory Comm. Notes; Fed. R. Evid. 606(b), 1972 Advisory Comm. Notes, 1974 Notes, & 2006 Amends. And even if they were not secret, a reviewing court could not possibly know who the replacement juror would have been, much less speculate about how that juror would have viewed the evidence and participated in deliberations. "Given the delicate dynamics of jury deliberations, it is simply impossible to know the effects [one] juror had on her fellow jurors." *McIlwain* v. *United States*, 464 U.S. 972, 975-76 (1983) (Marshall, J., dissenting from denial of certiorari); *United States* v. *Annigoni*, 96 F.3d 1132, 1150 (9th

Cir. 1996) (en banc) ("[T]he error is not amenable to normal harmless error analysis, as we can never figure out what would have happened if one member of the jury had been struck and replaced by some other, unknown, person.") (Kozinski, J., dissenting); Roger J. Traynor, *The Riddle of the Harmless Error* 64-66 (1970) (a defendant who has been wrongly denied a peremptory challenge cannot possibly show prejudice "and should not be called upon to do the impossible at the appellate stage").

The impossibility of speculating how a different factfinder would have evaluated the evidence is why this Court in *Wingo*, 418 U.S. at 473-74, required a fresh habeas corpus hearing, without considering whether the error was harmless, when the hearing under review had been unlawfully presided over by a magistrate rather than a judge. "'To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents.'" *Id.* at 474 (quoting *Speiser* v. *Randall*, 357 U.S. 513, 520 (1958)). The fact that a district judge could review the proceedings de novo, including a recording of the testimony, 418 U.S. at 466, did not matter in *Wingo*. *Id.* When the error concerns "the mistaken organization of the court below," it is beyond the authority of an appellate court to undertake the harmless-error review conducted by the Illinois Supreme Court. *William Cramp & Sons*, 228 U.S. at 651. Review of a paper record is no substitute for the first-hand judgment of the lawful adjudicator to which petitioner is entitled.

The Illinois Supreme Court, relying on this Court's decision in *Neder*, concluded that harmless-error

review was, in fact, possible. JA 164-66. It reasoned that *Neder* authorizes harmless-error analysis whenever the error does not prevent the reviewing court from examining the record to determine whether "the evidence is so overwhelming that no rational jury—or juror—would have acquitted defendant of the offense." JA 166.[4] The Illinois Supreme Court has misread *Neder*.

Neder was based on this Court's precedents concerning improper instruction on an element of the offense. 527 U.S. at 12-13; see *Hedgpeth* v. *Pulido*, No. 07-544, slip op. at 3-4 (Dec. 2, 2008) (per curiam) (placing *Neder* in line of cases involving "various forms of instructional error" that "are not structural"). This Court had previously determined that defective instructions concerning an element of the offense could be reviewed for harmlessness. See *California* v. *Roy*, 519 U.S. 2, 5-6 (1996) (per curiam) (applying harmless-error review to misdescription of an element of a crime in habeas corpus proceeding); *Carella* v. *California*, 491 U.S. 263, 266-67 (1989) (per curiam) (reversing and remanding for state court to determine whether statutory presumptions were

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[4] Elsewhere, the Illinois Supreme Court suggests that *Neder* authorizes harmless-error review whenever an error "does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." JA 164 (quoting *Neder*, 527 U.S. at 9). In *Gonzalez-Lopez*, this Court expressly rejected the view that *Neder* establishes a single criterion for automatic reversal based exclusively on "'fundamental unfairness.'" 548 U.S. at 149 n.4. Regardless, for the reasons discussed above, trial before a tribunal with an unlawful adjudicator is fundamentally unfair, and, as discussed below, carries a sufficient risk of bias in the tribunal. Even *Neder* expressly recognized that the jury in Mr. Neder's case was "fairly selected." 527 U.S. at 9. Any fundamental unfairness standard is satisifed here.

harmless); *Pope* v. *Illinois*, 481 U.S. 497, 501-04 (1987) (finding harmless-error review applicable to misinstruction on constitutional element of First Amendment claim). *Neder* concluded that the failure to instruct on an element of the offense was indistinguishable from these misinstruction cases. 527 U.S. at 15 ("the matter is not *res nova* under our case law").

The Illinois Supreme Court's misreading of *Neder* is well illustrated by the manner in which it conducted harmless-error review here. The Illinois Supreme Court believed that it was permitted to conduct a wholesale evaluation of the entire record to determine whether a reasonable jury could have acquitted petitioner. JA 166-71. That review necessarily included the Illinois Supreme Court's own assessments of witness credibility seven years after trial and the weighing of inconsistencies against other evidence. JA 171. Even *Neder* disclaims the suggestion that it authorizes any such review. 527 U.S. at 11, 16 (emphasizing that "the jury-instruction error here did not 'vitiat[e] *all* the jury's findings'" and reviewing the record only with respect to the disputed element of the offense); see *Hedgpeth*, No. 07-544, slip op. at 4 (noting same limitation in *Neder*).[5] And such review is directly contrary to *Sullivan*. This Court unanimously held in *Sullivan*

[5] Likewise, *Neder* disclaims any suggestion that harmless-error analysis is warranted whenever a reviewing court determines that the evidence of guilt in the case is "overwhelming" and "uncontradicted," as the Illinois Supreme Court concluded here. JA 171-72. As *Neder* observed, the question whether to apply harmless-error analysis is decided on a "categorical" basis; an "error is either structural or it is not." 527 U.S. at 14. It is wrong to look at the quality or quantity of evidence in a particular case to determine whether to apply harmless-error analysis in that case.

that a defective reasonable doubt instruction, which does "vitiate *all* the jury's findings," is not reviewable for harmlessness because it is impermissible for a reviewing court to do precisely what the Illinois Supreme Court did here: "engage in pure speculation—its view of what a reasonable jury would have done." 508 U.S. at 281.

As this Court observed in *Sullivan*, when a reviewing court simply takes it upon itself to consider the record as a whole, offering its own independent evaluation of whether a rational jury could have acquitted, it is directing a verdict of guilt. *Id.* at 277. In its manner of review, the Illinois Supreme Court went even further than impermissibly "exerting the powers of a court of first instance." *William Cramp & Sons*, 228 U.S. at 651. It did what no judge may do: replace the jury's authority to assess witness credibility and weigh inconsistencies in testimony. JA 166-71. The Illinois Supreme Court's harmless-error review thus violated petitioner's right to trial by jury under the Sixth Amendment. *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977) ("regardless of how overwhelmingly the evidence may point" toward guilt, a trial judge may not direct a verdict of guilt); *United Bhd. of Carpenters* v. *United States*, 330 U.S. 395, 408 (1947) ("a judge may not direct a verdict of guilty no matter how conclusive the evidence"). This Court, therefore, should reverse the Illinois Supreme Court's ruling.

III. THE SEATING OF A JUROR WHOM THE DEFENDANT HAS LAWFULLY STRUCK IS STRUCTURAL ERROR BECAUSE IT CREATES AN UNACCEPTABLE RISK OF BIAS.

In light of the long tradition of peremptory challenges in this country—a tradition that still

commands universal acceptance—and their recognized role in ensuring a fair trial, seating a juror who has lawfully been struck by the defendant renders a trial fundamentally unfair in violation of the Due Process Clause because it creates an unacceptable risk of bias in the proceedings and grants the state an undue influence over the composition of the jury. For this reason as well, the error requires reversal without conducting harmless-error review.

A. Automatic Reversal Is Required When The Proceeding Involved An Unacceptable Risk Of Bias In Its Adjudication.

There is no doubt that adjudication before a tribunal free of actual bias is a core element of due process. *In re Murchison*, 349 U.S. at 136 ("Fairness of course requires an absence of actual bias in the trial of cases."); *Tumey*, 273 U.S. at 523 ("it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty . . . to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case"). And beyond that, "justice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14 (1954). Thus, "even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias." *Peters*, 407 U.S. at 502 (citing cases).

This Court has not hesitated to reverse any conviction, without inquiring into harmlessness, obtained through a process that creates a likelihood or appearance of bias. When the error relates to "the impartiality of the adjudicator," it concerns "the very integrity of the legal system" and thus "harmless-error analysis cannot apply." *Gray*, 481 U.S. at 668;

see *Vasquez*, 474 U.S. at 263-64; *Tumey*, 273 U.S. at 535 ("No matter what the evidence was against him, he had the right to have an impartial judge."). Thus in *Turner* v. *Louisiana*, 379 U.S. 466, 473-74 (1965), this Court reversed a conviction automatically because jurors were sequestered with deputies who were chief witnesses for the prosecution. This Court did not demand any demonstration that the members of the jury had discussed the case with those witnesses. "[E]ven if it could be assumed that the deputies never did discuss the case directly with any members of the jury," the risk that the jurors had been influenced by the "continuous and intimate association" with the witnesses rendered the trial unfair. *Id.* When an error undermines confidence in the fairness of the adjudicator, automatic reversal is required.

B. Seating A Juror Who Has Been Lawfully Stricken Pursuant To A Defendant's Peremptory Challenge Creates An Unacceptable Risk Of Bias That Violates Due Process.

The purpose of peremptory challenges is to promote the selection of a fair and impartial jury by permitting counsel (for both the prosecution and defense) to use their judgment to exclude those whom they believe will be most favorable to the other side. *Holland* v. *Illinois*, 493 U.S. 474, 484 (1990). What occurred here took a venerable process that promotes fairness, and inverted it. The trial court practice followed here required defense counsel to indicate, in front of Ms. Gomez herself, that he had sufficient concerns about her fairness as a juror to exclude her entirely. Rather than respect the lawful judgment of defense counsel, the State (acting through both the judge and prosecutor) mandated Ms. Gomez's

participation after being apprised of petitioner's counsel's concerns. Because the law respected petitioner's counsel's judgment sufficiently to empower him to exclude Ms. Gomez from the jury based on his view that she presented an unacceptable risk of unfairness, seating her should be deemed to create an unacceptable risk of unfairness that violates due process and requires automatic reversal. Unlike in *Neder*, the jury that adjudicated Mr. Rivera's case was not "fairly selected." 527 U.S. at 9.

1. As this Court has observed, peremptory challenges "date as far back as the founding of the Republic[,] and the common-law origins of peremptories predate that." *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 621 (1991); see *Swain*, 380 U.S. at 212 n.9. Blackstone spoke of the right to challenge individual jurors in terms that directly compared it to the *recusatio judicis* by which both the civil and canon laws allowed a judge to be challenged for partiality. William Blackstone, 3 *Commentaries* *361 (1765). Among the methods Blackstone recognized for achieving the end of an impartial adjudication were challenges *propter affectum* ("for suspicion of bias or partiality"), *id.*, which could be undertaken in a peremptory manner, 4 *Commentaries* *353. The rationale for the peremptory challenge included the belief that no person should be tried by "someone against whom he has conceived a prejudice," and also was based on a desire to allow the defendant to strike a juror who might resent the inquiry into his impartiality. *Id.* In short, the common law allowed peremptory challenges so that a defendant could be assured that he has had every opportunity to secure a fair trial before an impartial jury.

The connection between peremptory challenges and jury impartiality at the time of the framing was so

close that Patrick Henry and George Mason challenged James Madison over the lack of details for peremptory challenges in the Constitution and Bill of Rights. Madison replied, "The right of challenging is incident to the trial by jury, and therefore, as the one is secured, so is the other." William W. Van Alstyne, *The Constitution in Exile: Is It Time to Bring It in From the Cold?*, 51 Duke L.J. 1, 17 (2001).

This Court, too, has long acknowledged the close connection between the peremptory challenge and a fair trial by an impartial jury. In the late 19th century, this Court observed that "[e]xperience has shown that one of the most effective means to free the jurybox from men unfit to be there is the exercise of the peremptory challenge." *Hayes* v. *Missouri*, 120 U.S. 68, 70 (1887). More recent cases have routinely commented on the connection between the peremptory challenge right and the right to a fair and impartial jury. A veritable chorus of decisions proclaim that the right has "been viewed as one means of assuring the selection of a qualified and unbiased jury." *Batson*, 476 U.S. at 91; see also *Martinez-Salazar*, 528 U.S. at 307 ("one means to achieve the constitutionally required end of an impartial jury"); *Holland*, 493 U.S. at 484 (peremptory challenges support "the selection of a qualified and unbiased jury"); *Ross* v. *Oklahoma*, 487 U.S. 81, 88 (1988) ("a means to achieve the end of an impartial jury"); *J.E.B.*, 511 U.S. at 137 n.7 ("'one state-created means to the constitutional end of an impartial jury and a fair trial'") (quoting *McCollum*, 505 U.S. at 57); *Frazier* v. *United States*, 335 U.S. 497, 505 (1948) (peremptory challenges "given in aid of the party's interest to secure a fair and impartial jury").

More than a century ago this Court observed that peremptory challenges are "one of the most important

of the rights secured to the accused." *Pointer* v. *United States*, 151 U.S. 396, 408 (1894). And their persistence remains a strong indication of their continuing value to the administration of justice. Every state in the Union, and the District of Columbia, and the United States all provide a criminal defendant with the opportunity to exercise peremptory challenges during jury selection. David B. Rottman & Shauna M. Strickland, Bureau of Justice Statistics, *State Court Organization, 2004*, at 228-31, tbl.41 (2006), http://www.ojp.usdoj.gov/bjs/pub/pdf/sco04.pdf (collecting rules regarding peremptory challenges in all 50 states and the District of Columbia); Fed. R. Crim P. 24(b).

Part of the reason peremptory challenges have remained so important to securing a fair trial before an impartial tribunal is that actual bias is rarely obvious. It is often difficult for counsel and client suspicious of bias to extract from a prospective juror the kind of statements that would support dismissal for cause. It is "unlikely that a prejudiced juror would recognize his own prejudice—or knowing it, would admit it." Alfred Friendly & Ronald Goldfarb, *Crime and Publicity: The Impact of News on the Administration of Justice* 103 (1967); Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 Stan L. Rev. 545, 549-52 (1975). And statements that arguably reveal prejudice are often not deemed sufficient to overcome other statements by the same prospective juror that he or she can put aside any prior experiences or preconceived notions and judge the case based exclusively on the evidence presented. *Patton* v. *Yount*, 467 U.S. 1025, 1036 (1984) (The partiality of a juror is "plainly [a question] of historical fact: did a juror swear that he could set aside any opinion he might hold and decide the case

on the evidence, and should the juror's protestation of impartiality have been believed").

Just as important, the standard of dismissal for cause is both demanding and leaves the trial court with broad discretion.

> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Wainwright v. *Witt*, 469 U.S. 412, 424-26 (1985). For all practical purposes, when it comes to for-cause challenges, counsel is at the mercy of the judgment of the trial court. If counsel believes the trial court has erred and refused to dismiss a juror when it should have, the peremptory challenge provides an immediate opportunity to "correct" the error. *Martinez-Salazar*, 528 U.S. at 315-16; *Ross*, 487 U.S. at 89-91.

The peremptory challenge goes further than correcting errors rising to the level of abuse of discretion. It provides some opportunity for a party to catch those jurors who, in counsel's view, pose the greatest risk of unfairness, but who nonetheless have not demonstrated their biases in ways that would be widely recognized. An individual's bias can be

expressed in ways that are invisible on a paper record because they are revealed nonverbally. "To detect prejudices, the examiner . . . must elicit from prospective jurors candid answers about intimate details of their lives [and] must scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality." *Gomez*, 490 U.S. at 874-75; see Rebecca White Berch, *A Proposal to Amend Rule 30(b) of the Federal Rules of Civil Procedure: Cross-Disciplinary and Empirical Evidence Supporting Presumptive Use of Video to Record Depositions*, 59 Fordham L. Rev. 347, 348 n.9, 360 n.67 (1990) (collecting sources stating that nonverbal sources make up at least 60% of communication, and up to 93% including spoken but nonlexical sounds); see also Judee K. Burgoon & Aaron E. Bacue, *Nonverbal Communication Skills*, *in Handbook of Communication and Social Interaction Skills* 179 (John O. Green, Brant R. Burleson eds., 2003); Albert Mehrabian, *Silent Messages: Implicit Communication of Emotions and Attitudes* 77 (2d ed. 1981).

And not all individuals will pick up such nonverbal cues, or interpret them to indicate the same thing about the prospective juror's state of mind. "That a trial lawyer's instinctive assessment of a juror's predisposition cannot meet the high standards of a challenge for cause does not mean that the lawyer's instinct is erroneous." *J.E.B.*, 511 U.S. at 148 (O'Connor, J., concurring). "Voir dire provides a means of discovering actual *or implied* bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently." *Id.*, at 143-44 (emphasis added). "Our belief that experienced lawyers will often correctly intuit which jurors are likely to be the least sympathetic, and our

understanding that the lawyer will often be unable to explain the intuition, are the very reason we cherish the peremptory challenge." *Id.* at 148 (O'Connor, J., concurring).

The role of counsel's experienced judgment in helping to select a jury was recently highlighted by this Court as part of the reason that the wrongful denial of the right to counsel of choice is structural error. *Gonzalez-Lopez*, 548 U.S. at 150. This Court observed that "selection of the jury" and "questions asked on *voir dire*" are among the many important functions counsel serves during a trial. *Id.* at 150-51. And this Court has elsewhere observed the critical impact voir dire has on the jurors who ultimately sit in judgment of the defendant. "*Voir dire* permits a party to establish a relation, if not a bond of trust, with the jurors. This relation continues throughout the entire trial and may in some cases extend to sentencing as well." *Powers*, 499 U.S. at 413; see also *Gomez*, 490 U.S. at 875 (noting that "the atmosphere of the *voir dire* . . . may persist throughout the trial").

2. Both as a matter of unbroken historical practice, and practical impact, the peremptory challenge plays a critical role in the fairness of any jury trial in which they are used. That impact is dramatically highlighted when, as here, an attorney lawfuly announces his intention to use one of his peremptory challenges to strike a juror, but the court erroneously seats the juror anyway. Such an error violates due process.

After questioning Ms. Gomez about her work at a hospital known for treating large numbers of gunshot victims, counsel for petitioner announced in open court (as was required), in front of Ms. Gomez and other prospective jurors, his intention to strike Ms. Gomez. JA 33. He did so with the full expectation that the law demanded respect for his judgment

regarding Ms. Gomez. The prosecutor raised no objection to the challenge initially. Rather, the judge at that moment called all counsel and the defendant back to chambers. JA 33-34. After defense counsel was forced to express his reasons why he was concerned that Ms. Gomez might not fairly judge the case, JA 34, a concern which the Illinois Supreme Court considered reasonable and legitimate, JA 157, the prosecutor expressly asked to have Ms. Gomez "impaneled as a juror." JA 35. The trial court agreed and placed Ms. Gomez on the jury.

The potential for bias created by this process is substantial. To begin, petitioner lost the benefit of his trial counsel's judgment regarding Ms. Gomez's potential for bias. This is the precise fairness-advancing function the peremptory challenge is supposed to provide. *Supra* at 29-34. But beyond the bare fact that Ms. Gomez sat on the jury, she did so *after* learning that counsel for petitioner sought to have her removed. And the other jurors, who also observed petitioner's counsel seek to have Ms. Gomez removed, chose her as the foreperson. JA 44. This raises concerns about the impressions that the jurors formed of petitioner and his counsel in light of the incident. *Cf. Powers*, 499 U.S. at 413 (noting that the "relation" between a party and the jury established during voir dire "continues throughout the entire trial"). Finally, the prosecutor urged that Ms. Gomez be placed on the jury after all of this unfolded, and his request was granted. Peremptory challenges by the prosecution are as legitimate as peremptory challenges by the defense. But that is because "[t]he right to challenge is the right to reject, not to select a juror." *Hayes*, 120 U.S. at 71. Here, the State—both judge and prosecutor—selected a juror after the defendant expressed concerns about her fairness.

"[D]ue process imposes limitations on the composition of [the] jury." *Peters*, 407 U.S. at 501. "Illegal . . . jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well." *Id.* at 502-03. For this reason, it does not matter that Ms. Gomez has not been shown to have been *actually* biased. The process used to select petitioner's jury created an intolerable risk of bias, thus exceeding the limits of due process.

In addition, the denial of petitioner's peremptory challenge shifted the balance of power over the composition of the jury decidedly to the State in petitioner's case. "[A] shift in the balance of peremptory challenges favoring the prosecution over the defendant can raise due process concerns." *United States* v. *Harbin*, 250 F.3d 532, 541 (7th Cir. 2001). No state allows the prosecution more peremptory challenges than the defendant, and many give the defendant more, especially in capital and felony cases. See Rottman & Strickland, *State Court Organization* 228-31, tbl.41 (2006), http://www.ojp.usdoj.gov/bjs/pub/pdf/sco04.pdf (listing eight states as giving the defendant more peremptory challenges in capital cases, seven in felony cases, and two in misdemeanor cases). Even more obviously, no state permits the prosecution the right to trump the defendant's exercise of one of its peremptory challenges. The substantial shift in power over peremptory challenges that occurred here, with the State vetoing one of petitioner's challenges while petitioner had no similar ability to veto any of the State's challenges, violated due process. *Cf. Wardius* v. *Oregon*, 412 U.S. 470 (1973) (state requirement that defendant provide notice-of-alibi on pain of

exclusion of alibi evidence at trial requires, as a matter of due process, a reciprocal discovery obligation be imposed on the prosecution).

Further, long-established Illinois law, and the essentially unbroken tradition of peremptory challenges stemming from its English common law roots and throughout our nation's history, created a protectable interest in the expectation that petitioner's lawful challenge of Ms. Gomez would be respected. See *Bd. of Regents* v. *Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."). "[I]t would require a remarkable reading of [the Due Process Clause] to conclude that a horse trainer's license is a protected property interest under the Fourteenth Amendment, while a state-created right" to participate in the selection of a jury that is fair and impartial is not a protected liberty interest. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 431 (1982); *Hicks* v. *Oklahoma*, 447 U.S. 343, 346 (1980) (state procedural right to be sentenced in the first instance by the jury creates a "substantial and legitimate expectation" the denial of which violates due process). That is especially so given that this Court has repeatedly stated that peremptory challenges are a state created means to the constitutional end of an impartial jury. *Supra* at 30-31 (citing cases). The trial court's arbitrary ruling deprived petitioner of his protectable interest in the effective use of his peremptory challenge, thus violating due process. *Hicks*, 447 U.S. at 346.

The constitutional significance of the error here thus does not depend on the existence of a free-standing constitutional right to peremptory challenges. This Court has repeatedly emphasized that peremptory challenges are creatures of state law and not a matter of constitutional compulsion. *Martinez-Salazar*, 528 U.S. at 307 ("'peremptory challenges [to prospective jurors] are not of constitutional dimension'") (quoting *Ross*, 487 U.S. at 88). This Court need not alter that rule to hold that the denial of this state-crated right in this way violated due process.

There is no constitutional right to a direct criminal appeal. *McKane* v. *Durston*, 153 U.S. 684, 687 (1894). Yet if a state chooses to provide a defendant as a matter of state law with a right to a direct criminal appeal, it must do so consistent with the standards of due process. *Evitts* v. *Lucey*, 469 U.S. 387, 393 (1985). That standard requires the state to take steps necessary to ensure that the appeal is no "meaningless ritual," which includes both providing an indigent defendant with an attorney, *Douglas* v. *California*, 372 U.S. 353, 358 (1963), and ensuring that the attorney does not render ineffective assistance, *Evitts*, 469 U.S. at 396. In short, while the state need not establish a right to an appeal to challenge the lawfulness of a conviction, once it does, the Due Process Clause precludes it from administering the right in a way that defeats its purpose; a defendant cannot be denied "a fair opportunity to obtain an adjudication on the merits of his appeal." *Evitts*, 469 U.S. at 405; see *Hicks*, 447 U.S. at 345-46.

The same principle of due process applies here. The state need not provide criminal defendants with peremptory challenges. But once it does, the Due

Process Clause precludes the state from administering that right in a way that defeats its purpose; a defendant cannot be denied a fair opportunity to use his peremptory challenges to exclude jurors the defendant believes will be unfair.

The state thus violated due process here. That violation affected the composition of the jury. The error was structural; reversal of the conviction should be automatic.

CONCLUSION

The judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted,

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